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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

CURTIN MATHESON SCIENTIFIC, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING RESPONDENT

This brief *amicus curiae* of the Chamber of Commerce of the United States of America (the "Chamber") is filed with the consent of the parties, as provided for in Rule 36.2 of the Rules of this Court.

STATEMENT OF INTEREST

The Chamber is the largest association of business and professional organizations in the United States. Its membership consists of approximately 180,000 companies and

several thousand other organizations such as state and local chambers of commerce and trade and professional organizations.

The Chamber regularly represents the interests of its member employers in important labor relations matters vitally affecting those interests before this Court, the lower courts, the United States Congress, the Executive Branch and the National Labor Relations Board. Such representation constitutes a significant aspect of the Chamber's activities. Accordingly, the Chamber has sought to advance those interests by filing briefs in a wide spectrum of labor relations litigation.[1]

The instant case presents an issue of vital concern to the Chamber and its member employers—*i.e.*, whether employers must presume that permanent strike replacements desire union representation even though those permanent replacements align themselves against any striking union's most important self-help initiative by crossing a picket line, thereby incuring the union's enmity, and often becoming targets of union retribution and violence.[2] The issue has an impact on any of the numerous Chamber members which must resolve whether a union represents a majority of employees during and after a strike when strikers have been replaced with lawfully hired permanent replacements. The filing of this brief will enable the Court to consider the perspective of employers which experience first-hand the inherent conflict between striking unions and striker replacements

[1] *E.g., Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 109 S.Ct. 1225 (1989); *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988); *Pattern Makers League v. NLRB*, 473 U.S. 95 (1985).

[2] As discussed in Part I.A., the Board has mischaracterized the issue in this case by claiming to apply no presumption at all. (*See* Pet. Br. I, 5). In fact, the Board presumes that permanent replacements do want union representation.

—a conflict that renders absurd the Board's presumption that permanent replacements desire exclusive representation by a striking union.

SUMMARY OF ARGUMENT

For twenty-five years the Board maintained a rule that comported with common sense: the Board presumed that permanent striker replacements vote with their feet against representation by a striking union when they align themselves against that union by crossing its picket line. Inexplicably, the Board has more recently taken the opposite approach—first, by openly applying a presumption that striker replacements do want union representation, and then, by purporting to apply a no-presumption rule but, in fact, continuing to presume union support. The former approach was unanimously rejected by the federal courts of appeals. The latter approach was rejected by the court below and should be rejected by this Court.

Any presumption that permanent striker replacements are likely to want the striking union representing them cannot withstand review. First, the Board's presumption is simply not rational as it fails to take account of the inherent conflict of interests between permanent striker replacements and striking unions—a conflict which the Board itself has recognized—and the resulting probability that those permanent replacements would not desire to entrust their exclusive representation to the striking union. Second, the Board's approach is also irrational in that it exacerbates the existing disparity in the parties' access to relevant evidence by placing upon the employer the entire burden of proving loss of majority even though the employer is the only party hamstrung by Board restrictions on polling and other non-coercive means of ascertaining the representational wishes of replacements. Finally, the Board's approach fails to comport with the National Labor Relations Act ("NLRA") itself since

it forces replacements to give up their fundamental Section 7 right to refrain from being represented by the striking union and instead, locks in replacements to preserve the striking union's representational status.

The Board's approach is entitled to no deference, not only because it is so contrary to reality, but also because the Board never addressed conflicts with its own prior precedent. Moreover, the Board's rationale is premised upon the type of balancing of economic weapons this Court has repeatedly forbidden the Board from performing. But even if the Board's ultimate conclusion was correct that "no overriding generalization" (Pet. App. 76a) is possible about the representational preferences of replacements, that would mean that as a matter of law, there is a question concerning representation when a unit majority consists of permanent striker replacements. Section 9 of the NLRA mandates that the Board resolve questions concerning representation by conducting elections. In contrast, the Board has most often refused to conduct elections and, instead, the Board's General Counsel has sought to resolve such questions concerning representation through unfair labor practice proceedings. Thus, even if this Court does agree with the Board's ultimate conclusion that it is difficult to generalize concerning the representational desires of replacements, it should not permit the Board to ignore the statutorily mandated means for ascertaining those desires.

ARGUMENT

I. THE ONLY RATIONAL PRESUMPTION TO BE DRAWN FROM STRIKER REPLACEMENTS ALIGNING THEMSELVES AGAINST A STRIKING UNION BY CROSSING ITS PICKET LINE AND PERMANENTLY REPLACING STRIKERS IS THAT THE REPLACEMENTS DO NOT DESIRE UNION REPRESENTATION.

A. The Board's New "No-Presumption Rule" is No Different from its Previous Presumption, Unanimously Rejected by the Courts of Appeals, that Striker Replacements Want Union Representation.

Employers may lawfully hire permanent replacements for economic strikers in an effort to continue operations and thereby defeat a strike.[3] It is also well-settled that an employer may withdraw recognition from a union if, based on objective considerations, it has a good faith doubt that the majority of employees desire union representation.[4] The issue in this case is whether an employer may presume that lawfully hired permanent replacements, who are strangers to representation by the striking union and who align themselves with the em-

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[3] *See Trans World Airlines*, 109 S.Ct. at 1230; *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345-46 (1938).

[4] *See Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 41 n.8 (1987); *NLRB v. Financial Institution Employees of America*, 475 U.S. 192, 198 (1986); *Brooks v. NLRB*, 348 U.S. 96, 182 (1954); *Whisper Soft Mills, Inc. v. NLRB*, 754 F.2d 1381, 1387 (9th Cir. 1984); *Retired Persons Pharmacy v. NLRB*, 519 F.2d 486, 489 (2d Cir. 1985); *Celanese Corp. of America*, 95 N.L.R.B. 664 (1951).

For one year after the commencement of an economic strike, the relevant employee complement includes economic strikers, permanent replacements, non-strikers and "cross-overs" (strikers who elect to abandon a strike and return to work). After this one year pericd, economic strikers are ineligible to vote in a Board election and thus are no longer considered to be within the relevant employee bargaining unit. *See* 29 U.S.C. § 159(c)(3).

ployer in seeking to defeat the union's strike and, indeed, to permanently replace the strikers, do not desire representation by the striking union.[5]

For at least a quarter century, the Board assumed or presumed that striker replacements do *not* desire union representation.[6] The federal courts of appeal affirmed this common sense approach.[7] One of the nation's leading

[5] Where, as here, permanent replacements are strangers to a striking union and to representation by that union, the usual Board rule that an incumbent union's majority support is presumed to continue has no relevance. In fact, where, as here, permanent replacements have never had any opportunity to vote on union representation, the only presumption that makes sense is that they do not desire representation.

[6] *See Arkay Packaging Corp.*, 227 N.L.R.B. 397, 397-98 (1976), *aff'd*, 575 F.2d 1045 (2d Cir. 1978); *Beacon Upholstery Co.*, 226 N.L.R.B. 1360, 1367-68 (1966) (employer "had a reasonably based doubt that the Union continued to represent a majority" where 10 of 13 members of unit were replacements); *Peoples Gas Systems, Inc.*, 214 N.L.R.B. 944, 947 (1974) (union's interests were "diametrically opposed to those of the strike replacements"), *rev'd on other grounds sub nom. Teamsters Local Union 769 v. NLRB*, 532 F.2d 1385, 1391 (D.C. Cir. 1976); *S&M Mfg. Co.*, 172 N.L.R.B. 1008, 1008-09 (1968); *Titan Metal Mfg. Co.*, 135 N.L.R.B. 196, 215 (1962) (employer "justified in refusing to bargain with the Union" as "[t]here was no evidence that any of the replacements had authorized the Union to represent them"); *Jackson Mfg. Co.*, 129 N.L.R.B. 460, 478 (1960) (it is "most improbable" that "the replacements hired during the strike had chosen the Union to represent [them]"); *Stoner Rubber Co.*, 123 N.L.R.B. 1440, 1444 (1959) (not "unreasonable to assume that none of [the employer's] permanent replacements were union adherents"); *Celanese*, 35 N.L.R.B. at 674 (fact that majority of unit was made up of replacements was "sufficient, in our opinion, to have given rise to a reasonable doubt that Union continued to represent a majority of the employees in the unit").

[7] *NLRB v. Alva Allen Indus., Inc.*, 369 F.2d 310, 316 (9th Cir. 1966); *Philip Carey Mfg. Co. v. NLRB*, 331 F.2d 720, 734 (6th Cir.) ("In light of the large number of strikers who were permanently replaced, there would be substantial grounds of doubt concerning the union's majority status."), *cert. denied*, 379 U.S. 388 (1964).

labor law treatises also subscribed to this view long held by the Board, thereby giving rise to its description today as the "Gorman presumption." *See* R. Gorman, *Labor Law* 112 (1976) ("[I]f a new hire agrees to serve as a replacement for a striker . . . it is generally assumed that he does not support the union and that he ought not be counted toward a union majority.")

Beginning in 1977, however, the Board abandoned the historical presumption with which Professor Gorman concurred and adopted the opposite approach: presuming that striker replacements wanted representation by a striking union.[8] No particular evidence, logic or problem was cited by the Board as a basis for its 180-degree shift. Every Court of Appeals to consider the Board's new presumption of adherence to the union rejected it out of hand.[9] As the Eighth Circuit concluded, a presumption that a new employee who acts so as to defeat its effort to shut down an employer nonetheless wants union representation is "ridiculous" and "far from reality." *National Car Rental System v. NLRB*, 594 F.2d at 1206.

Faced with this overwhelming vote of no confidence, the Board announced that it would reconsider its erroneous approach in *Buckley Broadcasting Corp. (Station KKHI)*, 284 N.L.R.B. No. 113 (July 27, 1987), *applic.*

[8] *See Windham Community Memorial Hosp.*, 230 N.L.R.B. 1070 (1977), *enf'd on other grounds*, 577 F.2d 805 (2d Cir. 1978).

[9] *See Whisper Soft Mills, Inc. v. NLRB*, 754 F.2d 1381, 1388 (9th Cir. 1984); *NLRB v. Pennco, Inc.*, 684 F.2d 340, 342 (6th Cir.), *cert. denied*, 459 U.S. 994 (1982); *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1111 (1st Cir. 1981) (striker replacements are "not presumed to support the union whose picket line they have been crossing"); *National Car Rental System, Inc. v. NLRB*, 594 F.2d 1203, 1206 (8th Cir. 1979); *NLRB v. Randle-Eastern Ambulance Service*, 584 F.2d 720, 728 (5th Cir. 1978) (" 'generally assumed' " replacements do " 'not support the Union' " (citation omitted)); *NLRB v. Windham Community Mem. Hospital*, 577 F.2d 805, 813 (2d Cir. 1978).

for enforcement pending, No. 88-7106 (9th Cir. 1988). But while purporting to do away with its discredited presumption that permanent striker replacements want union representation in that decision, the Board reached effectively the very same conclusion and merely dressed it up in superficially different garb.

Under the *Buckley/KKHI* standard applied by the Board in this case, as under the Board's discredited presumption of union support, the Board automatically concludes, absent proof by an employer to the contrary, that permanent striker replacements nonetheless want representation by the striking union. The only difference is that now that conclusion rests on a presumption not limited to striker replacements alone. *See* Pet. App. 9a ("Under either standard, the Company is required to have objective evidence regarding the striker replacements' non-support [for the Union] in order to count them as employees whom the Company doubts support the Union.")

The lack of difference between the Board's *Buckley/KKHI* standard and its discredited presumption of union support is readily apparent from the Board decisions applying *Buckley/KKHI*. Six times the Board has applied *Buckley/KKHI* in reviewing decisions by administrative law judges that had ruled against an employer on the basis of the old presumption of union support; in none of these cases did the Board reach a different result under its supposedly new and different standard.[10] In fact, despite the Board's claim to weigh such questions on a flexible, case-by-case basis, in the twelve decisions

[10] *See Accurate Die Casting Co.*, 292 N.L.R.B. No. 106 (Feb. 10, 1989); *Tube Craft, Inc.*, 289 N.L.R.B. No. 122 (July 14, 1988); *Cook Bros. Enterprises*, 288 N.L.R.B. No. 46 (April 8, 1988); *Tile, Terrazo & Marble Contractors Ass'n*, 287 N.L.R.B. No. 79 (Dec. 16, 1987); *Valley Kitchens, Inc.*, 287 N.L.R.B. No. 69 (Dec. 16, 1987); *Bickerstaff Clay Products*, 286 N.L.R.B. No. 27 (Sept. 30, 1987), *enforcement denied*, 871 F.2d 980 (11th Cir. 1989).

since *Buckley/KKHI* the Board has *never* found that an employer has produced sufficient evidence of union nonsupport among replacements to rebut the Board's new presumption of majority status.[11] And the Board has reached that conclusion even in the face of: the hanging of an effigy of a replacement;[12] evidence of 47 incidents of damage to replacements' cars, threats and verbal abuse;[13] and a Board finding that union officers committed an unfair labor practice by threatening replacements with violence in an effort to prevent their crossing a picket line.[14]

The Board's brief would have this Court believe that it applies a "no-presumption rule" in determining whether permanent striker replacements desire union representation. (Pet. Br. I, 5). In fact, as the Fifth Circuit correctly concluded, that characterization fundamentally misstates the approach adopted by the Board below. Indeed, the Board itself has candidly admitted previously that what it now seeks to defend as a "no-presumption rule" is, in fact, an application of an "overall presumption of continuing majority status." *See Tile, Terrazo & Marble Contractors Ass'n*, 287 N.L.R.B. No. 79, at 2 n.2 (Dec.

[11] *See* cases cited in note 10, *supra*; *Glover Bottled Gas Corp.*, 292 N.L.R.B. No. 99 (Feb. 8, 1989); *Hajoca Corp.*, 291 N.L.R.B. No. 16 (Sept. 30, 1988), *enforced*, 872 F.2d 1169 (3d Cir. 1989); *Proxy Communications of Manhattan, Inc.*, 290 N.L.R.B. No. 68 (July 29, 1988), *enforced*, 873 F.2d 552 (2d Cir. 1989); *Dold Foods, Inc.*, 289 N.L.R.B. No. 156 (July 28, 1988); *Johns-Manville Sales Corp.*, 289 N.L.R.B. No. 40 (June 27, 1988); *Curtin Matheson Scientific, Inc.*, 287 N.L.R.B. No. 35 (Dec. 16, 1987), *enforcement denied*, 859 F.2d 362 (5th Cir. 1988), *cert. granted*, 109 S.Ct. 3212 (1989). Similarly, a review of published charge dispositions by the NLRB General Counsel reveals not a single Section 8(a)(5) charge dismissed on the basis of evidence of replacement nonsupport for a striking union found to be sufficient to overcome the *Buckley/KKHI* standard.

[12] *See Johns-Manville Sales Corp., supra.*

[13] *See Dold Foods, supra.*

[14] *See Proxy Communications, supra.*

16, 1987). Thus, a more accurate description of the Board's current approach to permanent replacements is to say that its non-presumption is, in fact, a presumption. As the Fifth Circuit properly concluded, the Board's non-presumption presumption "has the same effect" as its prior presumption that striker replacements support the striking union. (Pet. App. 9a).[15] And, as shown below, the Board's adoption of a new label for its discredited presumption of union support cannot change the fact that any such approach is both irrational and contrary to the NLRA.

B. The Presumption that Replacements Do Not Desire Representation is Rational and Consistent with the Act; The Board's Non-Presumption Presumption is Neither.

"[C]ourts have the duty to review the Board's presumptions 'both for consistency with the Act, and for rationality.'" *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773, 787 (1979) (quoting *Beth Israel Hospital, Inc. v. NLRB*, 437 U.S. 483, 501 (1978)). For example, in *Baptist Hospital*, this Court barred the application of a presumption that union solicitation of hospital employees did not disturb patient care where the solicitation occurred in corridors and sitting rooms used by patients. *Id.* at 787-89. Similarly, the lower federal courts have applied this principle to set aside other erroneous presumptions adopted by the Board.[16] Application of that

[15] Indeed, the Board virtually concedes this in the last paragraph of its brief. *See* Pet. Br. at 28 n.18 ("To be sure, under the no-presumption rule the employer must still overcome the general rebuttable presumption that the union enjoys majority support").

[16] *See, e.g., Royal Coach Lines, Inc. v. NLRB*, 838 F.2d 47, 50 (2d Cir. 1988) (irrational to presume union's continuing majority status where union had obtained recognition through unlawful means); *United Scenic Artists, Local 829 v. NLRB*, 762 F.2d 1027, 1034 (D.C. Cir. 1985) (presumption set aside because of absence of "rational nexus between the proven facts and the presumed facts").

principle to the case at bar requires that the Board's non-presumption presumption be set-aside in favor of the non-representational presumption applied by the Board for a quarter century.

1. *Only the Non-Representational Presumption Comports with Probability and the Reality of the Inherent Conflict Between Striker Replacements and Striking Unions.*

"The most important consideration" in testing the rationality of a presumption is "probability"—*i.e.*, the likelihood that "proof of fact B renders the existence of fact A so probable that it is sensible and timesaving to assume the truth of fact A until the adversary disproves it." E. Cleary, *McCormick on Evidence* § 343 at 969 (1984 & supp. 1987); *accord* 9 Wigmore, *Evidence* § 2491 at 304 (Chadbourn rev.).

Only the presumption that striker replacements do not desire union representation satisfies this test; the Board's non-presumption presumption reaches an absurd result that cannot be reconciled with the real world conflict between striking unions and lawfully hired permanent striker replacements. Indeed, the Board itself has conceded the implausibility of believing that striker replacements desire union representation in another current line of cases that it never even addressed in formulating the *Buckley/KKHI* standard.

The Board has repeatedly held that there is an "inherent conflict" of interests between striker replacements and a striking union.[17] The Board has recognized that a

[17] *See, e.g., Service Electric Co.*, 281 N.L.R.B. No. 633 (1986). Because of this conflict, the Board has concluded that employers have no obligation to bargain with a striking union "concerning the continued employment terms of [striker] replacements." *Id.*; *see also Schmidt-Tiago Constr. Co.*, 286 N.L.R.B. No. 31 (Sept. 30, 1987); *Marbro Co.*, 284 N.L.R.B. No. 129, at 2 (July 24, 1987); *Leveld Wholesale, Inc.*, 218 N.L.R.B. 1344 (1975). Federal courts have reached the same conclusion. *See Woodward Sand Co. v.*

striking union cannot bargain simultaneously in the best interests of both strikers and their replacements. *Service Electric*, *supra* at 14. If a striking union strives to assert the replacements' interests, it "undermines its own strike objective by allowing the struck employees to continue operations with replacements working under terms formulated as a result of its own negotiations." *Id.* at 14. The only effective way to advance the union's strike objective is to demand that any striker replacements be fired or, at a minimum, bargain for conditions that impede their employment. Significantly, the Board has recognized that striker replacements are themselves aware of this conflict: "Strike replacements can reasonably foresee that if the union is successful, the strikers will return to work and the strike replacements will be out of a job." *Leveld Wholesale, Inc.*, 218 N.L.R.B. at 1350.

Because of the "inherent conflict" between striker replacements and striking unions, the Board has concluded that it is "not logical to expect [a striking union] 'to negotiate in the best interests of strike replacements.'" *Service Electric*, 281 N.L.R.B. at 13-14 (quoting *Leveld Wholesale*, 218 N.L.R.B. at 1350). That same finding compels rejection of the Board's non-presumption presumption in favor of the non-representational presumption referred to by Professor Gorman. If, as the Board has found, it is improbable (or, as the Board has said "not logical" to believe) that a striking union would fairly represent striker replacements, then it is at least as improbable that striker replacements would desire such representation.

As employers, the members of the Chamber of Commerce have first-hand knowledge of the implausibility of the *Buckley/KKHI* presumption. The Chamber's members' experience confirms that striking unions regard striker replacements as "traitors" for undercutting any

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Western Conference of Teamsters Pension Trust Fund, 789 F.2d 691, 696 (9th Cir. 1986); *Capitol-Husting Co. v. NLRB*, 671 F.2d 237, 246 (7th Cir. 1982).

strike's objective—shutting down the employer by keeping all employees out—and for permanently replacing strikers. In union parlance, unions regard replacements as "scabs"—a term this Court has recognized to be an "insult or epithet." [18]

The hostility of striking unions toward replacements is evidenced in any number of ways. The Board's decisions and other accounts of strikes are filled with cases of

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[18] *See Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 283 (1974). The antipathy evidenced in striking unions' view of replacements as "scabs" is best illustrated by a "well-known piece of trade union literature" found by this Court to have been "published countless times in union publications" which purports to supply a definition of that term that has been attributed to Jack London:

> The Scab
>
> After God had finished the rattlesnake, the toad and the vampire, he had some awful substance left with which he made a scab.
>
> A scab is a two-legged animal with a cork-screw soul, a water brain, a combination backbone of jelly and glue. Where others have hearts, he carries a tumor of rotten principles.
>
> When a scab comes down the street, men turn their backs and Angels weep in Heaven, and the Devil shuts the gates of Hell to keep them out.
>
> No man (or woman) has a right to scab so long as there is a pool of water to drown his carcass in, or a rope long enough to hang his body with. Judas was a gentleman compared with a scab. For betraying his Master, he had character enough to hang himself. A scab has not.
>
> Esau sold his birthright for a mess of pottage. Judas sold his Savior for thirty pieces of silver. Benedict Arnold sold his country for a promise of a commission in the British Army. The scab sells his birthright, country, his wife, his children and his fellowmen for an unfulfilled promise from his employer.
>
> Esau was a traitor to himself; Judas was a traitor to his God; Benedict Arnold was a traitor to his country; a SCAB is a traitor to his God, his country, his family and his class.

Id. at 268 (citation and emphasis omitted).

unions subjecting replacements to threats of violence.[19] All too often, union picketers violently attack or even shoot at replacements.[20] Often replacements find their homes firebombed or vandalized or find their car tires slashed or windshields smashed.[21] Striking unions fre-

[19] *See, e.g., Bickerstaff Clay*, 871 F.2d at 986; *United Tel. Answering & Communications Serv. Union, Local 780*, 276 N.L.R.B. 507, 510 (1985) (member of union's executive board engaged in "illegal coercion" by twice threatening to "kick [a replacement's] 'ass' and her 'mother's ass' " if she crossed the picket line); *NLRB v. Union Nacional de Trabajadores*, 611 F.2d 926, 931 (1st Cir. 1961) (replacements threatened with "large broken pieces of wooden two-by-fours in a raised position"); *Teledyne Indus., Inc.*, 295 N.L.R.B. No. 25, at 6-7 (June 15, 1989) (picketers threatened replacements with sledge hammers and wrenches); *I T Services*, 263 N.L.R.B. 1183, 1187-88 (1982) (union picketers threatened to kill replacements and their family members); *District 34, Int'l Ass'n of Machinists*, 254 N.L.R.B. 282, 284 (1981) (union picketers threatened to kill replacements); *Brotherhood of Railway Carmen, Local Union No. 543*, 248 N.L.R.B. 285, 288 (1980) (union agents followed replacement home from work and told him that his arms and legs would be broken if he continued to work).

[20] *See, e.g., Bickerstaff Clay*, 871 F.2d at 986-92 (finding "a pervasive atmosphere of violence" against replacements "ranging from a shotgun blast into the home of an employee to slashed tires"); *Randle-Eastern*, 584 F.2d at 728; *I T Services*, 263 N.L.R.B. at 1187-88 (union picket captains and other picketers engaged in "pervasive" campaign of "violence and intimidation" against replacements); *District 34, Int'l Ass'n of Machinists*, 254 N.L.R.B. at 285 (elderly replacement assaulted by picketer); *Pennco, Inc.*, 250 N.L.R.B. 716, 718 n.16 (1980), *enf'd*, 684 F.2d 340, 342 (6th Cir.), *cert. denied*, 459 U.S. 994 (1982); New York Times, June 8, 1988, at B-1, col. 2 (boats piloted by replacements "were shot at as they passed under bridges"): S. Estreicher, *Strikers and Replacements*, 38 Lab. L.J. 287 (1987) (much picket line violence "is a product of, or response to, the hiring of replacement workers").

[21] *See, e.g., Johns-Manville Sales Corp., supra*, 289 N.L.R.B. No. 40, at 6 (seventy replacements' cars "sustained some combination of smashed windows, slashed tires, or body damage"); *Maine Town's Quiet Shattered by Strike*, New York Times, July 26, 1987, at 2, col. 1 (house believed to belong to replacement "firebombed

quently demand that replacements be fired.[22] And union representatives often force replacements to endure taunts, threats of termination, obscenities and other abuse in crossing a picket line to get to work.[23] The depth of the "enmity[] extends far beyond the picket lines," turning "brother against brother" in a manner that " '[s]ounds like the Civil War.' " *Town Tainted by Bitterness Over Yearlong Mine Strike*, New York Times, June 30, 1986, at B-1, col. 2.

The depth of the hostility unions feel to striker replacements does not end when a strike ends. Indeed, in one mill-town, descendants of replacements who crossed a picket line in 1921 "are still known as sons of scabs."[24] In short, the Board's non-presumption presumption leads to as improbable a result as presuming that chickens desire exclusive representation by foxes. *See Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 750 (1981).

The absurdity of the Board's treatment of permanent striker replacements is also evident in comparing it to its treatment of strikers. Curiously, the Board does pre-

and the word 'scab' was written on the outside"); *Town Tainted by Bitterness Over Yearlong Mine Strike*, New York Times, June 30, 1986, at B-1, col. 2 ("Tires have been deflated and car windows have been broken"); New York Times, Oct. 12, 1988, at A-14, col. 1 (replacement's "car vandalized").

[22] *See, e.g., Randle-Eastern*, 584 F.2d at 728; *Dold Foods, supra*, 289 N.L.R.B. No. 156, at 9 (union's "main argument" at bargaining table was that employer should discharge sufficient replacements to make room for strikers; replacements knew of this demand); *Johns-Manville Sales Corp., supra*, 289 N.L.R.B. No. 40, at 3.

[23] *See, e.g.*, New York Times, Feb. 1, 1986, at 54, col. 1 (strikers "taunted workers attempting to enter"); New York Times, Oct. 12, 1988 at A-14, col. 1 (replacements "showered with insults").

[24] *Paper Mill Strike Ends, But the Anger Remains*, New York Times, Oct. 12, 1988, at A-14, col. 1.

sume from the fact that an employee participates in a strike that the employee supports the union, but refuses to draw the opposite presumption when a replacement refuses to participate in a strike. *See, e.g., United Union of Roofers*, 296 N.L.R.B. No. 83, at 10 (1989). Moreover, the Board applies its *Buckley/KKHI* approach to permanent replacements without regard to the length of the strike. *See, e.g., Glover Bottled Gas Corp., supra* (Board presumes replacements want union representation despite two year strike). In contrast, Section 9(c)(3) of the NLRA declares economic strikers not reinstated one year after commencement of an economic strike to be ineligible to vote. 29 U.S.C. § 159(c)(3). Even after this one-year period has run, the Board would still require an employer to produce evidence of objective considerations of non-union support in a unit comprised entirely of permanent replacements. But after the one-year period has run, there is no union representational interest in strikers that would warrant Board protection; the sole focus should be on the desires of the replacement work force.

Even the AFL-CIO concedes that a replacement's crossing of a picket line signals that it is "less likely" that the replacement desires union representation. (AFL-CIO Br. at 6-7 n.5) The Board's approach assumes the opposite. Thus, it fails to comport with common sense or this Court's insistence that presumptions reflect the most probable outcome.[25]

[25] *See Bickerstaff Clay*, 871 F.2d at 992 ("common sense dictates that it is highly unlikely that a replacement worker supports the union if the union is negotiating for his discharge and he crosses a picket line, violent or not, to report to work each day").

2. *Only the Non-Representational Presumption Corrects the Unavailability of Evidence to Employers and Reflects the Ready Availability of Evidence to Striking Unions.*

Courts also test the rationality of a presumption by judging whether it "correct[s] an imbalance resulting from one party's superior access to proof." E. Cleary, *supra* § 343 at 968. Again, only the presumption that permanent replacements do not desire representation by the striking union satisfies this requirement. As discussed below, employers are hamstrung and face enormous obstacles to ascertaining whether or not replacements want union representation; in contrast, unions face no such obstacles and are likely to have proof of any desire for union representation in those few instances where replacements may have that preference. Thus, the non-representational presumption, which places the burden on the union of coming forward with evidence that replacements want union representation, corrects an imbalance of proof; the Board's non-presumption presumption only exacerbates that imbalance.

Employers face severe restrictions on their ability to gather evidence of the representational desires of replacements. The Board holds that an employer may not poll its employees to determine if a union has lost its majority status unless the employer first has evidence of objective considerations showing that a majority of employees rejects the incumbent union[26]—an absurd Catch-22 rule that has been repeatedly rejected by the federal courts of appeals.[27] Similarly, an employer cannot question indi-

[26] *See, e.g., Roanwell Corp.* 293 N.L.R.B. No. 3, at 1-2 (Feb. 28, 1989).

[27] *See Mingtree Restaurant, Inc. v. NLRB*, 736 F.2d 1295, 1297 (9th Cir. 1984) ("By the Board's reasoning, an employer in doubt of a union's majority status would be allowed to take a poll only when it had no actual need to do so, that is, when it already had sufficient objective evidence to justify withdrawal of recognition."); *Thomas Industries, Inc. v. NLRB*, 687 F.2d 863, 867 (6th Cir.

vidual employees or strike replacements about their representational desires without running a serious risk that the Board will find an unfair labor practice.[28] Nor can

1982) (finding "Board's position to be untenable"); *NLRB v. A. W. Thompson, Inc.*, 651 F.2d 1141, 1145 (5th Cir. 1981) (Board's requirements for employer polling rejected as tantamount to an outright ban).

Despite the courts' repeated rejections of the Board's approach, the Board stubbornly continues to adhere to its view that the "standard for employer polling is the same" as the standard for withdrawal of recognition. *See Texas Petrochemicals Corp.*, 296 N.L.R.B. No. 136, at 10 (Sept. 29, 1989). The Board has conceded that "this similarity does present what at first blush appears to be the anomaly that an employer cannot conduct a poll until it has acquired sufficient evidence to make a poll unnecessary, i.e., sufficient evidence to withdraw recognition, without 'need' for a poll." *Id.*

[28] Whether and when employees can be questioned by an employer remains a murky area of Board law. *See Rossmore House*, 269 N.L.R.B. 1176 (1984), *affirmed*, 760 F.2d 1006 (9th Cir. 1955) (overruling *PPG Industries*, 251 N.L.R.B. 1146 (1980)). Avowed union supporters apparently can be engaged in an uncoercive dialogue concerning the basis for their union sympathies, but there is no need to inquire whether avowed union supporters support the union. While the Board apepars to permit uncoercive inquiries about the *basis* for employee's union support, recent Board cases appear to forbid inquiries into *whether* employees support a union. *See Keystone Lamp Mfg. Corp.*, 284 N.L.R.B. No. 74 (June 30, 1987); *Morgan Services, Inc.*, 284 N.L.R.B. No. 95 (1987). To determine whether employer questioning is coercive and thus violative of Section 8(a)(1), the Board applies "a case-by-case analysis which takes into account the circumstances surrounding an alleged interrogation . . ." *Sunnyvale*, 277 N.L.R.B. 1217 (1985); *Morgan Services, Inc., supra.*

At the very least, then, the legality of employer inquiries concerning the union sympathies of individual employees individually or collectively is unclear at best. Even more important for purposes here, under the Board's "blocking charge" rules, an NLRB election —even one requested by striker replacements—would be blocked for months or even years while the Board applies its "case-by-case analysis" to all of the circumstances surrounding an alleged interrogation. The "blocking charge" rules create the same delays where an employer uses polling or some other non-coercive means of ascertaining replacements' representational desires.

an employer circulate or instigate a petition as a means of ascertaining whether replacements want union representation.[29]

Striking unions face none of these restrictions. "In contrast to the many decisions outlawing systematic interrogation by employers, it is clear that there is no such rule barring interrogation by unions . . ." Gorman, *Labor Law* at 176 (1976). Unions are also free to poll replacements to determine the extent of union support. *Id.*

In light of this disparate access to proof, the non-representational presumption applied by the Board for a quarter of a century is the only sensible one: It alone makes it easier for the party lacking access to relevant evidence—the employer—to vindicate its position while placing the burden of going forward on the party which is most likely to have such evidence. Indeed, the Board itself recognized as much more than thirty years ago in logic that is just as compelling today. "Proof of majority is peculiarly within the special competence of the union . . . An employer can hardly prove that a union no longer represents a majority since he does not have access to the union's membership lists and direct interrogation of employees would probably be unlawful as well as of dubious validity." *Stoner Rubber Co.*, 123 N.L.R.B. 1440,

[29] 1 C. Morris, *The Developing Labor Law*, § 13 at 605 (1983).

Employer election petitions to test the representational status of incumbent unions are dismissed out of hand by the Board in the absence of the very kinds of "objective considerations" required to establish loss of majority support. *See Texas Petrochemicals Corp. supra*, 296 N.L.R.B. No. 136, at 16 n.25. Thus, any argument that the employer here, Curtin Matheson, could have filed an election petition to test the union sympathies of its largely replacement workforce truly begs the question. If in the Board's view, Curtin Matheson had no basis for withdrawing recognition from the Union, the same lack of proof of non-support would have caused the Board to dismiss any election petition Curtin Matheson might have filed. The law does not require futile acts.

1445 (1959). Applying that reasoning, the *Stoner* Board held that an employer's production of evidence that half the workforce was made up of striker replacements was sufficient to shift the employer's initial burden to the General Counsel: "The presumption [of continuing majority support] then loses its force and the General Counsel [and the Union] must come forward with *evidence* that on the refusal-to-bargain date the union in fact did represent a majority of employees . . ." *Id.* (emphasis in original).

3. *Only the Non-Representational Presumption is Consistent with the National Labor Relations Act.*

The presumption that permanent replacements do not desire exclusive representation by the striking union is also the only one that satisfies the last requirement for upholding an NLRB presumption: consistency with the National Labor Relations Act. *See Baptist Hospital*, 442 U.S. at 787.

Central to the statutory scheme of the NLRA is Section 7. That section guarantees all employees the fundamental right to make their own representational choice: employees may elect to "form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing;" but employees also have the equally fundamental right to elect "*to refrain* from any or all of such activities." 29 U.S.C. § 157 (emphasis supplied). This guarantee is enforced by the requirement of Section 9 that unions must be "designated or selected . . . by the majority of employees" to serve as the employee's representative. 29 U.S.C. § 159. Moreover, the Section 7 right to refrain from representation by a union is also protected by Section 8(b)(1)(A), which makes it an unfair labor practice to "restrain or coerce employees in the exercise of the rights guaranteed" in Section 7.

Applying these provisions, this Court has repeatedly recognized the right of employees to opt against union

representation. Most recently, in *Pattern Makers League v. NLRB*, 473 U.S. 95 (1985), this Court struck down a provision of a union's constitution forbidding resignations during a strike as a violation of the Section 7 right to refrain from concerted activity. Similarly, in *Booster Lodge No. 405 v. NLRB*, 412 U.S. 84 (1973), this Court held that a union violates Section 8(b)(1)(A) by fining an employee who resigned from a union for crossing a picket line. As this Court recognized, "freedom of choice and majority rule in employee selection of representatives" is "the premise of the Act." *International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 738-39 (1961).

The Board has also recognized that a union's institutional interests "simply cannot negate or otherwise overcome fundamental Section 7 rights" to refrain from union activities. *International Ass'n of Machinists, Local Lodge 1414*, 270 N.L.R.B. 1330, 1334 (1984). Thus, the Board has held that any restrictions on resignations from a union are an "unlawful" violation of the right "to refrain from union or other concerted activities." *Id.* Likewise the Board has held that because the "principle of majority rule" is "central to the framework" of the NLRA, it cannot impose union representation on a group of employees—even where the employer commits "pervasive" unfair labor practices—in the absence of evidence that the Union has majority support. *Gourmet Foods, Inc.*, 270 N.L.R.B. 578 (1984).

The Board's non-presumption presumption would violate the fundamental right to refrain from having union representation and the corollary principle of majority rule. Under the Board's approach, even where replacements are a majority of the unit, the replacements—whose one contact with the Union is to reject and weaken its strike by working and by permanently displacing strikers—become virtually locked into union representation and are easily foreclosed from exercising their right to elect against union representation. As this Court has

previously recognized, "[t]here could be no clearer abridgement of § 7 of the Act, assuring employees the right 'to bargain collectively through representatives of their own choosing' or 'to refrain from' such activity" than to impress a union upon a "nonconsenting majority." *International Ladies' Garment Workers' Union*, 366 U.S. at 737 (footnote omitted). All of the available evidence concerning the real world desires of striker replacements indicates that the Board's non-presumption presumption does just that. (*See supra* Part I.B.1.)

Nor can this violation of permanent striker replacements' Section 7 rights somehow be cured by replacements' filing of a decertification petition. Under the Board's contract bar rule, such petitions are barred for up to three years anytime a striking union does what the striking union did in this case: accepts an employer's final pre-strike offer. *See, e.g., Millbrook, Inc.*, 204 N.L.R.B. 1148 (1973); *General Cable Corp.*, 139 N.L.R.B. 1123 (1962). The practical result is that replacements are rendered "unable to exercise their right to choose a representative for many years hence." *Peoples Gas Systems, Inc. v. NLRB*, 629 F.2d 35, 45 n.17 (D.C. Cir. 1980). Striking unions frequently accept such pre-strike offers to preserve their representational status where, as here, they find that an economic strike has been unsuccessful. Striker replacements have no control over whether a striking union will create such a bar by accepting a pre-strike offer. In addition, if the employer's pre-strike offer contained a union security clause, striker replacements may find themselves compelled to pay union dues for the duration of any agreement or forfeit their jobs.

Moreover, Sections 8(a)(1) and (2) of the NLRA make it unlawful for an employer to recognize and bargain with a union that does not represent a majority of its employees. *See International Ladies' Garment Workers' Union*, 366 U.S. at 738. This unfair labor practice is not dependent upon an employer's good faith belief that a union represents a majority or upon the filing of a decertification petition. *Id.* at 737 n.8.

C. The Board's Non-Presumption Presumption Is Not Entitled to Any Deference.

In an effort to avoid scrutiny of its adoption of an approach that is both irrational and inconsistent with the NLRA, the Board asks this Court to "defer" to its judgment. But deference is neither required nor appropriate here.

First, an agency's decision is not entitled to any deference where, as here, it fails to reconcile a conflict with its own precedents.[30] The Board's freedom to change its mind does not afford it a license to simultaneously advance conflicting positions.

The Board's promulgation of its non-presumption presumption in *Buckley/KKHI* and its application in the case at bar violate this principle. There is simply no way to reconcile the Board's position in these cases with the rule and reasoning that the Board previously announced in *Service Electric Co.*, 281 N.L.R.B. No. 633 (1986) and *Leveld Wholesale, Inc.*, 218 N.L.R.B. 1344 (1975). If, as the Board concluded in *Service Electric* and *Leveld*, a striking union's conflict of interests with striker replacements makes it logically impossible for the

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[30] *See, e.g., Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade*, 412 U.S. 800, 808 (1973); *United Food & Commercial Workers v. NLRB*, 880 F.2d 1422, 1437 (D.C. Cir. 1989) (reversing Board for "failure to explain how it could reconcile the results that it approved in this case with the results contained in [other] Board decisions"); *New York Council, Ass'n of Civil Technicians v. FLRA*, 757 F.2d 502, 510 (2d Cir.), *cert. denied*, 474 U.S. 846 (1985); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir.) ("[I]f an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute"), *cert. denied*, 403 U.S. 923 (1971).

union to fairly and vigorously represent striker replacements, it cannot presume that striker replacements would want such union representation. No rational striker replacement would want to be represented by an institution whose interests so obviously diverge from his own.

The Board has never attempted to explain this contradiction between its new non-presumption presumption and its settled precedent. Instead, both *Buckley/KKHI* and the Board's opinion in the case at bar are silent on this inconsistency.

Second, the theories offered by the Board in support of its non-presumption presumption present the kinds of speculation that this Court has previously held are either entitled to no deference or utterly impermissible. Thus, the Board's lawyers argue in this Court that its rule is needed to promote stability. But nowhere in either *Buckley/KKHI* or the Board decision in this case did the Board itself ever rely on this theory. Nor, despite the musings of Board counsel, has the Board *ever* made any findings that employers misused the Gorman presumption to oust incumbent unions during the twenty-five years when it was the law of the Board. There was no discussion of any such employer abuse in either the Board's *Buckley/KKHI* decision (Pet. App. 75a) or in the decision announcing the initial change in Board policy by adopting the presumption of union adherence. *See Windham Community Hospital*, 230 N.L.R.B. at 1070.[31] As this Court

[31] Indeed, all evidence is that there is no danger that employers will abuse the non-representational presumption. Thus, the Board's brief identifies only one case in the twenty-five year period when the Board applied that presumption where an employer sought to abuse the Gorman presumption; the Chamber has likewise been unable to identify any other such case in that period. *See* Pet. Br. at 21 n.10 (citing *Laher Spring & Elec. Car Corp.*, 192 N.L.R.B. 464 (1971).

Moreover, as the *Laher* case illustrates, unfair labor practice procedures exist to deal with an employer who connives to under-

has repeatedly held, "courts may not accept appellate counsel's post hoc rationalization for agency action." *See Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 50 (1983).

The Board's rationalization that adoption of the Gorman presumption "would disrupt the balance of competing economic weapons" (Pet. App. 75a-76a) is likewise entitled to no deference as it presents yet another attempt by the Board to usurp for itself powers this Court has repeatedly held it does not have. As the Court first held in *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 497 (1960), the Board has no business acting "as an arbiter of the sort of economic weapons the parties can use . . . ." Federal labor law does not "contain a charter for the National Labor Relations Board to act at large in equalizing disparities of bargaining power between employer and union." *Id.* at 490. As the court noted in *American Ship Building Co. v. NLRB*, 380 U.S. 300, 310 (1965), the NLRA's "provisions are not indefinitely elastic, content-free forms to be shaped in whatever means the Board might think best conforms to the proper balance of bargaining power." Instead, Congress contemplated a system where the Board has no authority to interfere with the use of economic weapons. *Id.* at 316.[32]

In any event, even if this was a case where judicial review was properly limited by notions of deference, the Board's non-presumption presumption would still have to

mine a union's representational status by packing the workforce with replacements. No such unlawful conduct was alleged here. Instead, the Fifth Circuit expressly found that the number of replacements legitimately hired matched the number needed. (Pet. App. 3a).

[32] Significantly, the Board's brief cites no authority for its claimed power to engage in such balancing of economic weapons. *See* Pet. Br. at 25. The Board has conceded in other decisions that it lacks such authority, but refuses to recognize that limitation here. *See Harter Equip., Inc.*, 280 N.L.R.B. 597, 600 (1986), *aff'd*, 829 F.2d 458 (3d Cir. 1987).

be set aside. "Deference to the Board 'cannot be allowed to slip into a judicial inertia' . . ." *NLRB v. Financial Institution Employees*, 475 U.S. 192, 202 (1985) (quoting *American Ship Building*, 380 U.S. at 318). As shown in Part I.B. *supra*, the Board's non-presumption presumption is neither rational nor consistent with Board precedent or the NLRA. Thus, it must be set aside even if the Court's review is limited to ascertaining its reasonableness.

II. IN ANY EVENT, EVEN IF THE BOARD WERE CORRECT THAT NO UNIVERSAL GENERALIZATION ABOUT REPLACEMENTS IS POSSIBLE, IT REACHED A STATUTORILY IMPERMISSIBLE RESULT BY NOT RESOLVING THE QUESTION CONCERNING REPRESENTATION IN AN ELECTION UNDER SECTION 9 OF THE NLRA.

Central to the Board's defense of its non-presumption presumption is its claim that it can "discern no overriding generalization about the views held by strike replacements . . ." (Pet. App. 76a). As discussed in Part I.B.1., that finding is inconsistent with the overwhelming evidence that permanent strike replacements are unlikely to want to be represented by a striking union. But even if the Board acted rationally in refusing, as an empirical matter, to make such a generalization, its conclusion—that employers whose workforces contain majorities of striker replacements commit unfair labor practices by not bargaining with a striking union—reaches a statutorily impermissible result.

In essence, the Board's position in this Court is that it does not know what strike replacements want: the Board recognizes that "incumbent unions and strikers have sometimes shown hostility toward the permanent replacements . . ." (Pet. App. 74a). It likewise concedes that attitudes are likely to be influenced by their knowledge of the "union's primary concern for the striker's welfare, rather than that of the replacements." (Pet. App. 75a). Nevertheless, it believes that replacements "may" cross a picket line but still want union representation. (Pet. Br. at 17-18; Pet. App. 75a). The Board's difficulty in making a generalization, it reports, is compounded by the fact that the sentiments of employees "are in a state of flux" during and after a strike. (Pet. Br. at 22).

If the Board, with all its experience, cannot be sure whether strike replacements want union representation, then it must be that there is a question concerning representation where, as here, a majority of employees are replacements. Under the Act, when a "question of representation" exists it is the Board's duty to "investigate," "provide for an appropriate hearing," and "direct an election by secret ballot." 29 U.S.C. § 159(c).

But if the employer here had filed an election petition premised on its hiring of replacements, the petition would have been dismissed for lack of objective evidence of union non-support. Instead, the General Counsel would have and did opt to resolve the question concerning the representation of the striker replacements in an unfair labor practice proceeding which altogether denies them the right to vote in a Board election. *See Proxy Communications of Manhattan, Inc., supra*, 290 N.L.R.B. No. 68, at 3, n.3. Because the Board shirks its responsibility to conduct elections under Section 9 of the Act, the only means available to an employer for resolving whether a group of replacements want union representation as the Board administers the NLRA is to withdraw recognition and defend against the inevitable unfair labor practice charge. That route, however, places the entire burden on the employer for guessing the result of the hiring of a substantially different workforce—a particularly harsh result since the Board on the one hand acknowledges its uncertainty that replacements want union representation and on the other hand denies employers the opportunity to resolve that uncertainty by other non-coercive means such as polling. *See supra* Part I.B.2.

Equally importantly, while resulting unfair labor practice cases are being fought out, the desires of striker replacements, which are easily ascertainable through the Board ballot box, are ignored. This case is a perfect example. It arose in 1979. To this day, no attempt by the Board or the Union has been made to ascertain the representational desires of the lawfully hired permanent replacements. Instead, the Board has chosen to litigate for more than ten years its imposition of a presumption that is inconsistent with logic, reported Board precedent and the fundamental principle of the NLRA. In its zeal to preserve the union's representational status, the Board has failed to ascertain the representational desires of the replacement workers here about which the Board concedes it is impossible to generalize.

The Board's refusal to consider petitions for election from employers in this context fails to recognize that, as the AFL-CIO concedes in its brief, elections are the route contemplated by the NLRA to resolve whether replacements and other employees want union representation. (*See* AFL-CIO Br. at 2.) As this Court noted in *Linden Lumber Division v. NLRB*, 419 U.S. 301 (1974), Board-conducted secret ballots are also the most accurate and expeditious method of ascertaining employees' representational preferences.[33]

This Court should not sanction the Board's refusal to meet its responsibilities for conducting elections as required by Section 9. The Board's refusal to follow this NLRA directive is all too reminiscent of *NLRB v. Radio*

[33] There is no reason why Board elections in this context should result in inordinate delays. For example, the scope and composition of the bargaining unit would normally be known. And, nothing prevents the Board from establishing expedited election procedures for determining the representational desires of striker replacements. Instead of establishing a procedure for expediting these determinations, the Board has established a presumption that is contrary to common sense and the Act's basic tenets.

& Television Broadcast Engineers Union, Local 1212 (*"CBS"*), 364 U.S. 573 (1961). In that case, the Board had refused to decide which of two conflicting unions was entitled to perform work that each union was claiming in a jurisdictional dispute. This Court held that Section 10(k) of the NLRA, which empowers the Board to conduct hearings to resolve such disputes, "requires the Board to decide jurisdictional disputes on their merits . . ." *Id.* at 579.[34] As in *CBS*, here the Board refuses to take action mandated by the NLRA—in this case, meet its Section 9(c) responsibility to "investigate," "provide for an appropriate hearing," and "direct an election by secret ballot" to decide questions concerning representation. As in *CBS*, this Court should hold that the Board must comply with the congressional mandate.

In sum, even if there is enough uncertainty about replacements' preferences to bar application of the Gorman presumption, the Board has failed to take the path contemplated by the NLRA. Rather than exposing replacements to loss of their Section 7 rights and employers to unfair labor practice charges, the Board should live up to its responsibility for conducting elections to resolve such questions. Having failed to do so here, its decision should be set aside.

CONCLUSION

For all the foregoing reasons, the Fifth Circuit's decision rejecting the Board's absurd and unlawful non-presumption presumption should be affirmed.

[34] As the Court reasoned "[t]he words 'hear and determine the dispute' convey not only the idea of hearings but also the idea of deciding [the] controversy." *Id.* at 579. And because "Congress after discussion and consideration, decided to intrust this decision to the Board," the Court mandated that the Board exercise its authority and resolve the jurisdictional dispute. *Id.* at 583.

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